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[Proposed] Lead Counsel for [Proposed] Lead Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

STEPHEN LOPES, Individually and on Behalf)
of All Others Similarly Situated,)

Plaintiff,)

vs.)

FITBIT, INC., et al.,)

Defendants.)

Case No. 3:18-cv-06665-JST

CLASS ACTION

NOTICE OF MOTION AND MOTION FOR
CONSOLIDATION OF RELATED
ACTIONS, APPOINTMENT AS LEAD
PLAINTIFF, AND APPROVAL OF
SELECTION OF LEAD COUNSEL;
MEMORANDUM OF LAW IN SUPPORT
THEREOF

DATE: February 7, 2019
TIME: 2:00 p.m.
CTRM: 9, 19th Floor
JUDGE: Hon. Jon S. Tigar

1 TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD

2 PLEASE TAKE NOTICE that on February 7, 2019, at 2:00 p.m., or as soon thereafter as the
 3 matter may be heard in Courtroom 9 on the 19th Floor of the United States District Court for the
 4 Northern District of California, 450 Golden Gate Avenue, San Francisco, CA, 94102 before the
 5 Honorable Jon S. Tigar, class member Teamsters Local 710 Pension Fund (the “Pension Fund”) will
 6 and hereby does move this Court pursuant to the Private Securities Litigation Reform Act of 1995
 7 (“PSLRA”), 15 U.S.C. §78u-4(a)(3)(B), for an order: (1) consolidating the related actions pursuant
 8 to Fed. R. Civ. P. 42(a); (2) appointing the Pension Fund as lead plaintiff; and (3) approving the
 9 Pension Fund’s selection of Robbins Geller Rudman & Dowd LLP as lead counsel. This Motion is
 10 made on the grounds that the related actions allege substantially similar facts and raise identical legal
 11 issues, and the Pension Fund is the most adequate plaintiff to serve as lead plaintiff in the
 12 consolidated action. In support of this Motion, the Pension Fund submits herewith a Memorandum
 13 of Points and Authorities and the Declaration of Tricia L. McCormick (“McCormick Decl.”).

14 MEMORANDUM OF POINTS AND AUTHORITIES

15 I. INTRODUCTION

16 Presently pending in this District are two related securities class action lawsuits brought
 17 pursuant to §10(b) and §20(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and
 18 Securities and Exchange Commission (“SEC”) Rule 10b-5 promulgated thereunder, 17 C.F.R.
 19 §240.10b-5: (1) *Lopes v. Fitbit, Inc.*, No. 18-cv-06665-JST; and (2) *Patti v. Fitbit, Inc.*, 18-cv-
 20 06922-LHK (the “Related Actions”). Pursuant to the PSLRA, the Court must decide whether to
 21 consolidate the Related Actions before selecting a movant to lead this litigation on behalf of the
 22 putative class. *See* 15 U.S.C. §78u-4(a)(3)(B)(ii). As discussed below, the Related Actions should
 23 be consolidated pursuant to Rule 42(a) because they each involve similar legal and factual issues.

24 Additionally, the PSLRA states that, the Court “shall appoint the most adequate plaintiff as
 25 lead plaintiff.” *See* 15 U.S.C. §78u-4(a)(3)(B)(ii). The lead plaintiff is the “member or members of
 26 the purported plaintiff class that the court determines to be most capable of adequately representing
 27 the interests of class members.” 15 U.S.C. §78u-4(a)(3)(B)(i). The Pension Fund should be

appointed as lead plaintiff because it: (1) timely filed this Motion; (2) has a substantial financial interest in the outcome of this litigation; and (3) will typically and adequately represent the class's interests. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii). In addition, the Pension Fund's selection of Robbins Geller to serve as lead counsel should be approved because the Firm possesses extensive experience prosecuting securities class actions and will adequately represent the interests of all class members.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should consolidate the Related Actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure;

2. Whether the Court should appoint the Pension Fund as lead plaintiff pursuant to 15 U.S.C. §78u-4(a)(3)(B); and

3. Whether the Court should approve the Pension Fund's selection of Robbins Geller as lead counsel for the class pursuant to 15 U.S.C. §78u-4(a)(3)(B)(v).

III. STATEMENT OF FACTS

Fitbit is a technology company that manufactures health-related devices. The Company's products include wearable devices – health and fitness trackers and smartwatches – that enable users to view data about their daily activity, exercise, and sleep, in real-time. Fitbit is incorporated in Delaware and its principal executive offices are in San Francisco, California. Fitbit's Class A common stock trades on the New York Stock Exchange under the symbol "FIT."

The *Lopes* complaint alleges that throughout the Class Period, defendants made materially false and/or misleading statements, as well as failed to disclose material adverse facts about the Company's business, operations, and prospects. Specifically, the *Lopes* complaint alleges defendants failed to disclose: (1) that the Company was struggling to transition its mission and differentiate itself from Apple Inc. and other competitors; (2) that, as such, the Company was experiencing increased competition; (3) that, as a result, demand and sell-through for the Company's existing and new products were being negatively impacted; (4) that, as a result, the Company's sales and financial results were weakening, and growth was slowing; (5) that the Company's financial guidance was overstated; and (6) that, as a result of the foregoing, defendants' statements during the Class Period

about Fitbit's business, operations, financial results, and prospects, were materially false and/or misleading and/or lacked a reasonable basis. *See Lopes*, ECF No. 1 at ¶7.¹

On November 2, 2016, Fitbit issued a press release announcing its financial results for the third fiscal quarter of 2016, which disclosed that it was lowering its full year 2016 revenue guidance to "between \$2.320 billion and \$2.345 billion," down from the previously-announced "\$2.5 to \$2.6 billion." *Lopes*, ECF No. 1 at ¶3.

On this news, the price of Fitbit's shares declined over 30%, causing substantial harm to investors.

On January 30, 2017, Fitbit issued a press release announcing its preliminary fourth fiscal quarter 2016 financial results, which disclosed that the Company expected fourth quarter of 2016 revenue to be in the range of \$572 million to \$580 million, rather than its previously announced guidance range of \$725 million to \$750 million. Fitbit further announced that it forecasted its annual revenue growth to be approximately 17%, rather than the previously-announced forecast of 25% to 26%.

On this news, the price of Fitbit's shares declined over 15%, causing substantial harm to investors.

IV. ARGUMENT

A. This Court Should Consolidate the Related Actions to Promote Efficiency

The PSLRA requires the Court to consolidate the Related Actions before appointing a lead plaintiff. *See* 15 U.S.C. §78u-4(a)(3)(B)(ii). Consolidation pursuant to Rule 42(a) is proper when actions involve common legal and factual questions. Fed. R. Civ. P. 42(a). "Courts have

¹ The allegations in the *Patti* complaint are nearly identical. *See Patti*, ECF No. 1 at ¶4 ("Throughout the Class Period, Defendants made materially false and/or misleading statements regarding the Company's business, operational and compliance policies. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (i) the Company was facing headwinds, caused by greater competition in the marketplace; (ii) the Company was failing to differentiate its products from its competitors, including Apple Inc.'s ("Apple") Watch; (iii) consequently, demand for Fitbit's products was faltering; (iv) the Company overstated its financial guidance; and (v) as a result, the Company's public statements were materially false and misleading at all relevant times.").

1 recognized that class action shareholder suits are particularly well suited to consolidation pursuant to
 2 Rule 42(a) because unification expedites pretrial proceedings, reduces case duplication, avoids the
 3 need to contact parties and witnesses for multiple proceedings, and minimizes the expenditure of
 4 time and money for all parties involved.” *Hessefort v. Super Micro Computer, Inc.*, 317 F. Supp. 3d
 5 1056, 1060 (N.D. Cal. 2018) (Tigar, J.) (citations omitted). Furthermore, “[t]he district court has
 6 broad discretion . . . to consolidate cases pending in the same district.” *Investors Research Co. v.*
 7 *U.S. Dist. Ct. for Cent. Dist.*, 877 F.2d 777 (9th Cir. 1989).

8 The Related Actions present virtually identical factual and legal issues, alleging the same
 9 violations of the Exchange Act against similar defendants. Because these Related Actions are based
 10 on the same facts and legal issues, the same discovery will pertain to both lawsuits. Thus,
 11 consolidation is appropriate here.

12 **B. The Pension Fund Is the “Most Adequate Plaintiff” and Should Be**
 13 **Appointed Lead Plaintiff**

14 The PSLRA establishes the procedures for the appointment of a lead plaintiff in “each private
 15 action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the
 16 Federal Rules of Civil Procedure.” 15 U.S.C. §78u-4(a)(1); *see also* 15 U.S.C. §78u-4(a)(3)(B)(i).
 17 First, the pendency of the action must be publicized in a widely circulated national business-oriented
 18 publication or wire service not later than 20 days after filing of the first complaint. 15 U.S.C. §78u-
 19 4(a)(3)(A)(i). Next, the PSLRA provides that the Court shall adopt a presumption that the most
 20 adequate plaintiff is the person or the group of persons that –

21 (aa) has either filed the complaint or made a motion in response to a notice . . . ;

22 (bb) in the determination of the court, has the largest financial interest in the relief
 sought by the class; and

23 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil
 Procedure.

24 15 U.S.C. §78u-4(a)(3)(B)(iii)(I); *In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002). The
 25 Pension Fund meets each of these requirements and should be appointed Lead Plaintiff.
 26
 27
 28

1 **1. This Motion Is Timely**

2 The statutory notice of this action was published on November 1, 2018, advising class
3 members of: (1) the pendency of the action; (2) the claims asserted therein; (3) the proposed Class
4 Period; and (4) the right to move the Court to be appointed as lead plaintiff within 60 days from the
5 date of the notice, or by December 31, 2018. *See* McCormick Decl., Ex. A. Because this Motion is
6 being filed on December 31, it is timely and the Pension Fund is entitled to be considered for
7 appointment as lead plaintiff.

8 **2. The Pension Fund Has a Substantial Financial Interest in the**
9 **Relief Sought by the Class**

10 As evidenced by its PSLRA Certification, the Pension Fund purchased 52,300 shares of
11 Fitbit stock during the Class Period and suffered over \$300,000 in losses as a result of defendants'
12 alleged misconduct.² *See* McCormick Decl., Exs. B, C. Therefore, the Pension Fund has a
13 substantial financial interest in the relief sought by the class.

14 **3. The Pension Fund Is Typical and Adequate of the Putative**
15 **Class**

16 In addition to possessing a significant financial interest, a lead plaintiff must also “otherwise
17 satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. §78u-
18 4(a)(3)(B)(iii)(I)(cc). Rule 23 requires that “the claims or defenses of the representative parties are
19 typical of the claims or defenses of the class; and [that] the representative parties will fairly and
20 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(3)-(4); *Cavanaugh*, 306 F.3d at
21 730 (focusing “in particular” on typicality and adequacy at the lead plaintiff stage); *Super Micro*
22 *Computer*, 317 F. Supp. 3d at 1060-61 (“Once a movant has demonstrated that it has the largest
financial interest, it need only make a prima facie showing of its typicality and adequacy.”)

23 The test of typicality is “‘whether other members have the same or similar injury, whether
24 the action is based on conduct which is not unique to the named plaintiffs, and whether other class
25 members have been injured by the same course of conduct.’” *Hanon v. Dataproducts Corp.*, 976

26
27 ² The Pension Fund suffered a loss of \$305,921.17 calculated under the first-in, first-out
28 accounting methodology, or \$300,855.36 under the last-in, first-out methodology.

1 F.2d 497, 508 (9th Cir. 1992) (citation omitted). The adequacy requirement is met if no conflicts
 2 exist between the representative and class interests and the representative's attorneys are qualified,
 3 experienced and able to vigorously prosecute the action on behalf of the class. *See* Fed. R. Civ. P.
 4 23(a)(4).

5 Here, the Pension Fund purchased Fitbit securities and suffered harm when defendants'
 6 alleged misconduct was revealed. *See* McCormick Decl., Exs. B-C. In addition, the Pension Fund's
 7 substantial stake in the outcome of the case indicates it has the requisite incentive to vigorously
 8 represent the class's claims. Moreover, the Pension Fund is not aware of any conflicts between its
 9 claims and those asserted on behalf of the putative class and is not subject to any unique defenses.
 10 Finally, as discussed below, the Pension Fund has selected qualified counsel experienced in
 11 securities litigation.

12 The Pension Fund's common interests shared with the class, substantial financial interest in
 13 the litigation, and selection of qualified counsel demonstrate that it satisfies the Rule 23 inquiry.

14 **C. The Court Should Approve the Pension Fund's Selection of Counsel**

15 The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to
 16 the Court's approval. *See* 15 U.S.C. §78u-4(a)(3)(B)(v). The Court should not disturb the lead
 17 plaintiff's choice of counsel unless it is necessary to protect the interests of the class. *In re Cohen*,
 18 586 F.3d 703, 711-12 (9th Cir. 2009); *Cavanaugh*, 306 F.3d at 732-35. The Pension Fund has
 19 selected Robbins Geller as lead counsel in this case.

20 Robbins Geller, a 200-attorney firm with one of its principal offices in this District, regularly
 21 practices complex securities litigation. *See* McCormick Decl., Ex. D. Courts throughout the
 22 country, including this Court, have recognized Robbins Geller's significant experience in
 23 successfully litigating complex securities class actions, which has resulted in the appointment of
 24 Robbins Geller attorneys to lead roles in hundreds of complex class action securities cases. *See, e.g.*,
 25 *Bodri v. GoPro, Inc.*, 2016 WL 1718217, at *5 (N.D. Cal. Apr. 28, 2016) (Tigar, J.) (finding that
 26 Robbins Geller "has extensive experience in litigating complex securities class actions" and that "the
 27 Court is satisfied that the lead plaintiff has made a reasonable choice of lead counsel"); *Super Micro*

Computer, 317 F. Supp. 3d at 1062 (approving Robbins Geller as lead counsel and finding that “Robbins Geller has experience as lead counsel in securities class action lawsuits, including lawsuits in this district.”); McCormick Decl., Ex. D. Accordingly, the Pension Fund’s selection of counsel is reasonable and should be approved.

V. CONCLUSION

The Related Actions are substantially similar in facts and legal issues, and should be consolidated for all purposes. Additionally, the Pension Fund has satisfied each of the PSLRA’s requirements for appointment as lead plaintiff. As such, the Pension Fund respectfully requests that the Court consolidate the Related Actions, appoint the Pension Fund as Lead Plaintiff, and approve its selection of counsel.

DATED: December 31, 2018

Respectfully submitted,

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[Proposed] Lead Counsel for [Proposed] Lead Plaintiff

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on December 31, 2018 e electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ TRICIA L. McCORMICK

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Mailing Information for a Case 3:18-cv-06665-JST Lopes v. Fitbit, Inc. et al

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)